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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

PETITIONER SCOTT'S REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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The Position of the United States Would Destroy Essential State Law Tort Protection and the Historical Constitutional Framework Upon Which That Protection is Based

In contrast to societies that settle their disputes with machine guns and grenades, we in the United States quite proudly point to our constitutional tradition under a "Rule of Law". The hallmark of our "Rule of Law" has been the concept of *reasoned* decisionmaking as opposed to decisions made by caprice and arbitrary fiat. Decisions and positions taken by our governmental institutions—especially the judiciary—must be based on logical, internally consistent reasoning.

To the public and the lawyers who practice before this Court, the ultimate protector of this mandate for reasoned decisionmaking has been the Supreme Court of the United States. Yet the incredible propositions put forth by the amicus brief of the Solicitor General suggest that the motto of this Court should be changed to "Abandon reason, all ye who enter here". Acceptance of the Seventh Circuit's position, as endorsed by the Solicitor General, will lead this Court away from the realm of reason into a Louis Carroll fantasy world of frightening dimensions.

The issue here, as framed by this Court's decisions in *Milwaukee I*[1] and *Milwaukee II*[2] is whether any state law can be applied to impose liability and provide a remedy[3] for interstate torts where:

1) the tortfeasor is in one state;
2) the tort victim is in another state; and,
3) the tortious conduct crosses state lines through the air or the water.[4]

To illustrate the extreme nature of the Solicitor General's position, this reply describes three legal frameworks which have been applied to this issue: 1) the historic framework prior to *Milwaukee I;* 2) the framework defined from reading the footnotes of *Milwaukee I* and *Milwaukee II;* and, 3) the framework created by the Seventh Circuit below and endorsed by the Solicitor General. To give the analysis more currency, petitioner asks the Court to consider these frameworks as applied to the following all too real hypothetical question.

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[1] *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).

[2] *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

[3] Petitioners' repeated reminders that the issues of liability and remedy are distinct continues to fall on deaf ears. *Davis* v. *Passman*, 442 U.S. 228 (1979); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1980).

[4] The holding of *Milwaukee I*—whatever that holding is—applies equally to air pollution. *See Washington* v. *General Motors Corporation*, 406 U.S. 109, 112, n.2 (1972), issued the same day as *Milwaukee I*.

How would these three legal frameworks apply in the event an accident like the Bhopal, India release occurred in the United States? An identical twin to the Bhopal methyl isocyanate plant exists in Institute, West Virginia—not far from the borders of Kentucky and Ohio. What if methyl isocyanate was released as a liquid from the Institute plant and had vaporized, and the vapor cloud traveled north and west into communities in Ohio and Kentucky? What if thousands of Kentucky and Ohio citizens were killed by the poison cloud? Alternatively, what if the deadly liquid poison remained in liquid form and traveled instead from the Institute plant into the Kanawha River, and thence down the Kanawha into the Ohio River, poisoning citizens in Kentucky and Ohio who drank the poisoned water? Could the Ohio and Kentucky victims bring a tort action under state law seeking damages and injunctive relief?[5]

Under the three different frameworks discussed below, the injured citizens of Ohio and Kentucky and the relatives of the dead Ohioans and Kentuckians would have dramatically different legal rights. Similarly, the law enforcement rights of Kentucky and Ohio state law enforcement agencies would also be dramatically different—depending on which framework applied. The three frameworks would provide relief to the Ohio and Kentucky victims, and to the law enforcement agencies of Kentucky and Ohio as follows.

A.

The Historical Framework Prior to *Milwaukee I*

Prior to *Milwaukee I*, the law on this subject was very clear. State law governed the issue of civil and criminal liability. (See cases cited in Petitioner Scott's petition at pp. 14-15 and in the Court of Appeals opinion at A-17, n.3). And the choice of state law was governed by choice of law rules of the

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[5] Petitioner Scott's action seeks both damages and injunctive relief. As noted above, the cause of action is the same under either form of relief and is independent of the relief sought.

forum state as long as these rules were consistent with due process. *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975).

Under this historic framework, there is no question that the injured Ohio and Kentucky citizens could bring their actions against the owners and operators of the West Virginia plant in the state courts of Ohio and Kentucky, respectively. Alternatively, they could bring the actions in the federal district courts in Kentucky and Ohio under diversity jurisdiction and venue would lie in such courts under 28 U.S.C. Section 1391. Under governing principles of *in personam* jurisdiction, it is clear that the Kentucky and Ohio courts, be they state or federal, would have *in personam* jurisdiction over the plant owners and or operators in West Virginia.[6] Finally, the choice of the substantive state tort law to be applied would be determined by the choice of law rules of the forum state.

Similarly, in the controversy below, the state courts of Illinois would have *in personam* jurisdiction against the out-of-state tortfeasor and would apply whatever state law was determined to be appropriate under Illinois choice of law rules. Further, the law is equally clear that a federal district court in Illinois in a diversity case brought on a state law claim would apply the choice of law rules of the forum state. Finally, venue would be proper in the federal district court in Illinois.

B.

The *Milwaukee I* "Holding" as Illuminated by *Milwaukee II*

This Court's decision in *Milwaukee I* as "illuminated" by this Court's decision in *Milwaukee II* has thrown an irrational monkeywrench into this carefully crafted historical framework. Frankly, lawyers' attempts to divine the "holding" of *Milwaukee I* as to the issue now before this Court is akin to Ulysses

[6] The Kentucky and Ohio law enforcement agencies could bring criminal charges against the West Virginia plant operator under Kentucky and Ohio law.

and his men reading goat entrails to divine the intention of the gods. The "true meaning" of *Milwaukee I* and its obscure footnotes on the issue of preemption of state law for interstate air and water pollution torts—and the constitutional or statutory basis for such preemption—is delphic.

Nevertheless, the cryptic footnotes of *Milwaukee I* have been given some illumination by another set of less than clear footnotes in *Milwaukee II*.

> If state law can be applied, there is no need for federal common law; if federal common law exists, *it is because state law cannot be used.*
>
> *Milwaukee II* at p. 313, n.7 (emphasis added).

The asserted import of this *Milwaukee II* footnote dictum, in combination with footnotes 6 and 9 of the *Milwaukee I* opinion, is that federal law, presumedly based in the Constitution, prohibits the application of state tort law to determine liability or establish remedy in cases of interstate air or water pollution torts. Nowhere is the constitutional provision which dictates such preemption identified; nowhere in either *Milwaukee I* or *Milwaukee II* are the implications of such a holding discussed or analyzed.

If some unspecified constitutional mandate preempts the application of state law to interstate air and water pollution torts, such preemption clearly extends to application of all state law. If in the words of *Milwaukee II*, federal law must govern the issue, "it is because state law cannot be used. "[7]

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[7] Indeed, one of the asserted purposes behind such preemption was to prevent one state's law from being applied to the "sovereign" interests of a neighboring state. In the field of interstate air and water pollution torts—unlike the myriad cases of interstate tort by other instrumentalities—there appears to be some hoary vestigial concept of 50 independent feifdoms ready to wage war unless federal law is applied to the issue of tort liability and remedy. Clearly this alleged purpose in preempting state law would be equally violated by applying the tortfeasor's law against the victim state and in requiring the victim state to seek relief in the tortfeasor state courts.

However, reading cryptic footnotes as if they were well-crafted declarations of major changes in an entire field of law is a dangerous exercise that can produce catastrophic results. By "holding" that federal law must determine tort liability for interstate air and water pollution torts in *Milwaukee I*, and then by holding in *Milwaukee II* that Congress in the passage of the Clean Water Act preempted any federal common law tort remedy, this Court has wiped out all tort law relief for victims of interstate air or water pollution.

Applying the *Milwaukee I* "holding" to the hypothetical release of methyl isocyanate, the injured Kentucky and Ohio citizens would be barred from any tort action under state law.[8] Under the cryptic footnote "holding" of *Milwaukee I* as illuminated by the footnotes of *Milwaukee II*, no state law can apply to interstate air and water pollution torts. See *City of Evansville, Inc. v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1018 n.30 (7th Cir. 1979). Since *Milwaukee II* held that no federal common law tort action survived the passage of the Clean Water Act (and implicitly, the Clean Air Act) and since Congress did not provide a tort remedy for interstate pollution torts in either the Clean Air Act or the Clean Water Act, the Kentucky and Ohio citizens would be without any tort relief. Similarly, under the same reasoning, Ohio and Kentucky law enforcement officials would be powerless to invoke Kentucky or Ohio criminal laws against the perpetrators of the act.

Such a federal law preemption would indeed be ironic in light of Congress's expressed intention to preserve state law when passing the Clean Air Act and Clean Water Act. Congress clearly intended to preserve state tort law in its historical framework and certainly expressed no desire to restrict the criminal law jurisdiction of the states.

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[8] By barring the state law cause of action, the *Milwaukee I* holding bars damage relief as well as any injunctive relief.

C.

The Seventh Circuit Variant

Trapped by the divined meaning of the *Milwaukee I* and *Milwaukee II* footnotes, and the anomalies created by adherence to such footnotes, the Seventh Circuit, with the endorsement of the Solicitor General, has built a second story to the *Milwaukee I* house of cards which is even more bizarre.

Having asserted that *Milwaukee I* declared a constitutional prohibition against the application of state law which was by implication reaffirmed in *Milwaukee II*, the Solicitor General then uses the last two pages of his brief to say that the petitioners here do have a cause of action under state tort law—but only under the state law of the tortfeasor's state and only in the federal or state courts in the tortfeasor's state (Solicitor General's brief at 13, 14)!

Under the variation announced by the Seventh Circuit below, and endorsed by the Solicitor General, the injured Ohio and Kentucky citizens could bring tort actions under state law, but only under West Virginia state law and only in West Virginia state courts or federal courts in West Virginia! Beyond the bizarre holding that only West Virginia tort law could apply, the Seventh Circuit's decision would bar Ohio and Kentucky courts (and federal district courts in Kentucky and Ohio) from applying West Virginia law and would disregard the express venue provisions of 28 U.S.C. Section 1391(a) which allows an action based on diversity of citizenship to be brought in the district where the plaintiff resides or where the cause of action arose. Needless to say, under the Seventh Circuit variant, Ohio and Kentucky law enforcement officials would be powerless to seek criminal sanctions under Ohio and Kentucky law against the perpetrators of the release.

The illogic of the *Milwaukee I* footnote "holding" that no state law can be applied in this situation is now compounded by the claim that state law can apply, but only if it is the

tortfeasor's state law and only if applied in the tortfeasor's state. Given the purported holding of *Milwaukee I* that all state law was preempted, where did this state law come from?

The Solicitor General does not say whether this state tort law claim is grounded in federal law or is truly state law. If it is grounded in federal law through some sort of unstated incorporation by Congress as a federal rule of decision under the Clean Water Act (see Petitioner Scott's petition, at p. 22), such a federal version of state tort law would create vast new problems. (See Petitioner Scott's petition, at pp. 22-25).

If the state law claim endorsed by the Solicitor General is not based on federal law but is truly state law, again, where did it come from? Clearly, the Solicitor General does not believe that the Congress revived the state law claim with the passage of the Clean Water Act.

> This Court's rationale for holding in Milwaukee II that the CWA displaced the federal common law of nuisance provides no ground for inferring that a state law action has been revived.
>
> Solicitor General's brief p. 8.[9]

If the state tort law cause of action did not come from the Clean Water Act, it must have existed prior to the Clean Water Act. If so, the Solicitor General is arguing that this Court's footnote holding in *Milwaukee I* did not preempt all state law tort causes of action, only causes of action under the victim's state law. Such an interpretation of *Milwaukee I* is simply preposterous. Either the Constitution preempted the application of all state law or no state law. Selective preservation of the tortfeasor state's law while destroying the victims state's law and judicial authority was not the holding of *Milwaukee I*.

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[9] It is clear that Congress is not empowered to create state law. Congress can only remove federal impediments to preexisting state law or alternatively adopt state law rules as federal rules of decision.

Equally without explanation, the Solicitor General endorses the Seventh Circuit's rewriting of the law of choice of law, *in personam* jurisdiction and venue in a diversity case. Concomitant with its *ex cathedra* revival of a state law claim under the tortfeasor's state law,[10] the Seventh Circuit also rewrote the United States Code as to venue and the due process clause as to *in personam* jurisdiction.

If the Seventh Circuit's position is correct and is approved by the Solicitor General, the only place this plaintiff can bring a diversity action under the tortfeasor's state law is the federal court in the tortfeasor's state. This would be a judicial rewrite of the Judicial Code's venue statute, 28 U.S.C. Section 1391(a). Under the theory supported by the Solicitor General, the plaintiff could only bring an action in the district where the defendants reside. In contrast, Section 1391(a) allows a diversity action to be filed either in the district where the defendant resides or where the plaintiff resides or where the cause of action arose.

Similarly, the position endorsed by the Solicitor General also rewrites the law of *in personam* jurisdiction. Under the Seventh Circuit's decision, the state law claim under the tortfeasor state's law can only be brought in the state and federal courts of the tortfeasor's state. This would completely rewrite the law of *in personam* jurisdiction.

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[10] Nowhere does the Solicitor General explain the Seventh Circuit's refusal to apply Indiana choice of law rules to Petitioner Scott's claim—which choice of law rules dictate application of Illinois law. Further, nowhere does the Solicitor General explain the Seventh Circuit's use of the Restatement of Torts as a "state law ground" to deny Scott's damage claim. Use of the Restatement to bar a claim for damages allowed by the Illinois Constitution is not authorized by either Illinois law or Indiana law.

Conclusion

The preposterous results arising from application of the frameworks of *"Milwaukee I/Milwaukee II"* and "the Seventh Circuit Variant" are indefensible from the standpoint of constitutional history or logic. This court must clear the air and reestablish the historic framework of reasoned principles governing this subject.

Respectfully submitted,

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